UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

James Robinson et al. Plaintiffs, v. Ford Motor Company, Inc., et al. Defendants.	Civil Action No. 1:04-cv-00844 Senior Judge S. Arthur Spiegel **CLASS ACTION**
The Equal Employment Opportunity Commission Plaintiff, v. Ford Motor Company, Inc., et al., Defendants.	Civil Action No. 1:04-cv-00845 Senior Judge S. Arthur Spiegel

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT AGREEMENT

I. INTRODUCTION

Plaintiffs James Robinson, Robert Payne, Gordon Rinfrow, Joseph Hendricks, Jonathan Glover, Karthan E. Norman, Jerome R. Harris, Sheilah Brackett, Terri Gaither, Gregory A. Dicks, and Robert Fails, Jr. ("Settlement Class Representatives" or "Named Plaintiffs"), on behalf of the Settlement Class ("Settlement Class"), respectfully request that this Court grant the Parties' Joint Motion for Final Approval of the Settlement Agreement ("Motion") achieved in this case. The Parties to this litigation have successfully negotiated the Settlement Agreement, attached hereto as Exhibit 1, which will settle all class claims against Defendants Ford Motor Company, Inc., ("Ford" or "the Company") and the International Union, United Automobile, Aerospace and Agricultural Implement Workers ("UAW") (collectively, "Defendants") with respect to apprenticeship selection. The Named Plaintiffs, the Company, UAW, and the EEOC have worked diligently to create a fair and reasonable resolution of the claims at issue in this case.

The two complaints filed in this case, one by the Plaintiffs and one by the EEOC, allege that the Company's process for selecting apprentices discriminates on the basis of race in violation of federal civil rights laws. In particular, the Named Plaintiffs challenge Ford's Apprenticeship Training Selection System (ATSS), which governs selection of employees for placement in Ford's highly sought-after apprenticeship training program. For Ford employees, the apprenticeship program provides access to a considerable lifelong career benefit. The training, education, and work experience provided by the apprenticeship training leads to better-paying and higher status jobs in the skilled trades. *See, e.g.*, Declaration of Robert Belton, Professor of Law at Vanderbilt University, May 13, 2005, attached hereto as Exhibit 2, ¶14(a) ("Belton Decl."). Because of the salary, prestige, and job security associated with skilled trade positions, such as plumber-pipefitter, electrician, and machine repairman, they are among the most coveted hourly worker jobs at Ford manufacturing facilities. The apprenticeship program is the means by which workers gain access to the training needed to compete for these positions; thus, gaining entry into the apprenticeship program is critical to accessing skilled-trade positions.

In this case, and in charges filed with the EEOC, the Named Plaintiffs allege that, through its apprenticeship selection process, Ford selected African-American employees to participate in the apprenticeship program at a substantially lower rate than it selected Caucasian employees. The Named Plaintiffs sought to change the apprentice selection mechanism, to obtain relief for lost training and job opportunities, and to obtain backpay.

After an extensive investigation and over a year of intense settlement negotiations, the Parties reached a settlement that achieves all of the objectives sought in the action and began the process of seeking court approval of the Settlement Agreement. A Complaint was filed in the Southern District of Ohio on December 27, 2004, in conjunction with preliminary approval papers. Following the comprehensive preliminary approval hearing in chambers on February 9, 2005, the Court granted preliminary approval to the settlement, provisionally certifying the Class, approving the Settlement Class Representatives and Settlement Class Counsel, approving the Notice submitted to the Court, and setting a Fairness Hearing for June 1, 2005. Notice was sent to the entire class of 3424 individuals, and the objection period has now ended. Five opt-outs were submitted to Class Counsel. Only three objections to the settlement were received (two from class members and one from a non-class member), none of which challenge its fundamental fairness.

The settlement reached by the Parties in this case is extraordinarily far-reaching and will accomplish several important objectives for the class members and for the public interest. First, the settlement will dramatically reform the apprenticeship selection process at Ford facilities nationwide. *See* Declaration of Cyrus Mehri, attached hereto as Exhibit 3, ¶27 ("Mehri Decl."); Belton Decl. ¶13. A jointly selected Industrial

Psychologist ("Expert") will create and implement an innovative new process by which Ford will select qualified apprentices. The process will be designed both to predict job success and to reduce adverse impact. Moreover, the Settlement Agreement ensures that this process will take place in a meaningful and expeditious manner by imposing a rigorous monitoring component, clear deadlines, and a detailed dispute-resolution mechanism.

Second, the settlement will rapidly and substantially expand apprenticeship opportunities for African-American employees at Ford. The Company will place 279 of its African-American employees on the apprenticeship eligibility list to redress the alleged shortfall resulting from the previous testing procedure. This is an unprecedented achievement in a settlement for an apprenticeship selection case. *See* Mehri Decl. ¶¶28, 31; Belton Decl. ¶14(c).

The settlement will also provide a monetary award of $2,400 to each Settlement Class Member who took the test and was not selected for the apprenticeship program. This relief is designed to provide compensatory damages related to the allegedly discriminatory testing regime. For contributions to the investigation and prosecution of the case, each Charging Party will receive $30,000.[1] Finally, the Settlement provides that Ford directly pay attorneys' fees and expenses.[2]

The programmatic and financial benefits to the Class are exceptional. The terms of the Settlement Agreement require Ford to invest substantial sums in training over a four-year period for each Settlement Class member who is selected for the apprenticeship program. *See* Mehri Decl. ¶22. The nation's leading expert on Title VII remedies, Professor Robert Belton, notes that "[i]t is difficult to quantify in monetary terms the value to those Settlement Class members who are to be selected [for the apprenticeship program], but the opportunity to participate in the apprenticeship training program can lead to journeyman status that will provide a substantial stream of income in skilled jobs for many years in the future." Belton Decl. ¶14a. This relief alone will radically change the racial composition of Ford apprentices in a brief period of time. Considered together with the complete redesign of the apprenticeship selection process and the monetary relief to the Settlement Class, the Settlement Agreement between the Plaintiff Class and the Company is truly groundbreaking. To counsel's knowledge, such sweeping relief has never before been achieved in a case of this kind. *See* Mehri Decl. ¶31; Belton Decl. ¶14 b, c (this case "is probably the first class action employment discrimination settlement involving an apprenticeship selection program that benefits black employees that runs nationwide for a single employer" and "involves the largest number of black employees … who … have a realistic potential to become apprentices in skilled trade jobs …").

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[1] The incentive payments to the Charging Parties are in lieu of the $2,400 monetary award for all other Class Members.

[2] The provisions related to attorneys' fees and expenses are addressed in the attached Plaintiff's Motion in Support of Award of Attorneys' Fees, pursuant to FRCP 23(h).

The outstanding programmatic and monetary relief provided by this settlement merits expeditious final Court approval. The terms of the settlement are not only fair to the Settlement Class, but are highly likely to approach the best possible result that could be obtained if the case was brought to trial. *See* Mehri Decl. ¶¶26, 33-35. Plaintiffs' Counsel, well-qualified and highly experienced in employment discrimination class actions,[3] and the EEOC are well-informed about the details of this litigation. The settlement discussions were adversarial and arms'-length. The proposed settlement

[3] *See* Mehri Decl. ¶¶2-11, 41, 43.

Agreement not only meets, but greatly exceeds, the legal standard of "fair, adequate, and reasonable," *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983), required for final approval of a settlement.

II. HISTORY OF THE CASE

The Named Plaintiffs each filed an EEOC charge in late 1997 or 1998, alleging that they had been discriminated against on the basis of race in the apprentice selection process. In August 2002, the EEOC issued a series of determination letters finding probable cause with respect to the Plaintiffs' charges, stating that Ford's apprentice selection process had an adverse impact upon Ford's African-American employees. In June 2003, Plaintiffs' Counsel contacted the Company to request that it reconsider its decision to administer the ATSS during the pendency of the Named Plaintiffs' claims. At that time, the Company agreed to enter into settlement talks with Plaintiffs' counsel under the auspices of the EEOC conciliation process.

For over a year, the Parties engaged in extensive arms'-length settlement negotiations in numerous, lengthy meetings in Cincinnati, Detroit, and Washington, D.C. In October 2004, the Parties concluded negotiations and agreed upon the terms of the proposed settlement.

III. THE SETTLEMENT PROVISIONS

The proposed Settlement Agreement in the instant case is the result of hard-fought, knowledgeable, non-collusive negotiations. It provides fair and reasonable –

indeed, outstanding – programmatic, monetary, and equitable relief to the Settlement Class.

A. Definition of the Class

The Settlement Class is defined as:

> All current and former Ford employees of African descent who took the ATSS for placement as an apprentice at any Ford facility during the Relevant Time Period[4] and were not placed on a Ford apprenticeship program eligibility list during the Relevant Time Period. The settlement class does not include current and former Ford employees who took the ATSS for placement as an apprentice at any facility that is now, or was at the time the test was taken, a Visteon facility.[5]

Settlement Agreement (hereinafter "S.A.") § III.O. at 4.

B. Programmatic Relief

The Settlement Agreement provides for significant and far-reaching programmatic relief. First and foremost, the settlement will ensure the creation of a new selection procedure designed to predict success in the apprentice program while reducing adverse impact on African-American candidates. To accomplish this goal, Ford will cease the use of the current ATSS for the selection of apprentices at Ford facilities in the United States. After a rigorous interview process, the Parties selected Dr. Kathleen Lundquist, an experienced industrial psychologist and President of Applied Psychological Techniques, Inc., to be the Expert.[6] Dr. Lundquist will design and validate the new apprentice selection instrument(s) within specific and well-defined timelines. The extensive reporting requirements in the Settlement Agreement will ensure full compliance with both the letter and spirit of the Settlement Agreement. The Settlement Agreement also provides for an internal recruitment component designed to advance equal opportunity for historically underrepresented groups with respect to the apprenticeship program. *See* S.A. § IV.F. at 11. Finally, the settlement provides for an Interim Selection Method that will reduce adverse impact to replace the ATSS during the period when the new selection procedure is being created and validated by the Expert. *See* S.A. § IV.E. at 10.

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[4]The Relevant Time Period is defined as the period from January 1, 1997 to the date of final approval. *See* S.A. § III.N. at 4.

[5] See Section VI.B. *infra* for a discussion of the Visteon exclusion.

[6] Dr. Lundquist has served as an expert in other employment discrimination settlement cases, such as Abdallah *et al.* v. The Coca-Cola Company Case No. 1-98-CV-3679 (RWS) (N. D. Georgia) (Court appointed Joint Expert for Settlement Agreement) and Gonzales, *et al.* v. Galvin, *et al.*. CA No. 96-4110 (N. D. Ohio). . Her curriculum vitae is attached hereto as Exhibit 4.

1. New Apprenticeship Selection Process

As noted above, the Settlement Agreement provides that an expert in industrial psychology, jointly selected by the Parties, will create and implement a new apprentice selection procedure at Ford. *See* S.A. §§ IV.A-B. at 5. The new method will be designed with the twin objectives of high validity and minimization of adverse impact. In creating the new selection instrument(s), the Expert will comply with the Uniform Guidelines on Employee Selection Procedures (UGESP)[7] and professional standards within the field of Industrial/Organizational Psychology,[8] and will work within the confines of UAW's collective bargaining agreement. *See id.*

The Parties have agreed to a detailed process and timeline for the creation and validation of the new apprentice selection procedure. First, within 180 days of Final Approval, the Expert will conduct a job analysis of the jobs that are performed by

[7] 29 CFR 14 §1607.
[8] *See* S.A. § IV.B. n.2 at 5.

apprentices in each of the major trades at Ford.[9] The Expert's analysis may utilize data from prior job analyses done by Ford, but will nonetheless generate a current, accurate, and professional final product that will be used as a basis for designing the new selection instrument(s). *See* S.A. § IV.B.2. at 6. Based on the results of the job analysis and after a review of the selection research literature, the Expert will construct a selection instrument or combination of instruments that is designed to produce, to the extent possible, a combination of four factors: (1) high validity; (2) minimization of adverse impact; (3) demonstrated utility; and (4) ease of administration. *See* S.A. § IV.B.3.a. at 6. The Expert will consider alternative procedures to paper and pencil tests, reviewing the testing research to identify methods that have proven to reduce disparate impact while maintaining strong validity. *See* S.A. § IV.B.3.c. at 7. The instrument(s) will also be designed to enable the Company to provide employees with their individual test results and to provide feedback to the employee to the extent practicable in order to help employees identify their strengths and weaknesses with respect to different types of test questions. *See* S.A. § IV.B.3.d. at 7.

Sixty days after the completion of the job analysis, the Expert will provide the Parties with an interim report that describes the results of the job analysis and the proposed new apprentice selection procedure. *See* S.A. § IV.B.3.b. at 7. The Parties will then have fifteen (15) days to comment on the interim report and provide suggested changes to the new procedure. *See id.* After the close of the comment period, the Expert will have six months to conduct a validity study of the selection instrument(s) and then ninety (90) days to prepare a Validation Report that will describe the results of the validity study. *See* S.A. § IV.B.4. at 8.

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[9] These trades are: electrical, millwright, plumber-pipefitter, machine repair, and tool and die. S.A. § IV.B.2.a. n.3 at 6.

The Parties will each be provided with a copy of the Validation Report, and shall have sixty (60) days to submit comments in response to the Report and the recommended selection instrument(s), at which point the Expert will either revise the Validation Report or issue a statement that a revision is unnecessary. *See* S.A. § IV.C.1.-2. at 9. In the unlikely event that one or more of the Parties objects to the proposed selection instrument(s), the Settlement Agreement provides for a dispute resolution mechanism.[10] S.A. § IV.C.3. Within sixty (60) days of the Expert's submission of his/her recommendations, and once the Parties agree to the proposed selection instrument(s), Ford shall implement the proposed instrument(s) for use in connection with apprentice selection at all Ford facilities nationwide. S.A. § IV.C.4. at 9.-10.

2. Interim Selection Method

The Settlement Agreement establishes an Interim Selection Method to be utilized during the period between the cessation of the current ATSS process and the implementation of the new, expert-designed and validated selection method. Ford's need for apprentices during this period will be met in one of two ways: (1) from the Settlement Class members and Charging Parties; or (2) only after the Settlement Class members have all been accommodated, an interim selection method recommended by the Expert. *See* S.A. § IV.E.2. at 10. It is expected that, while the Expert develops a new selection procedure, Ford's need for apprentices is not likely to exceed the 279 new apprentices who will be added to the eligibility list pursuant to the Settlement Agreement.

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[10] *See* S.A. § XII at 22-23.

3. Internal Recruitment

In addition to the direct changes to the ATSS, Ford will also work to create and employ procedures and methods intended to identify, recruit, and encourage minority and female candidates for the apprenticeship program. Such methods may include outreach to potential minority and female candidates, preparation of such candidates for the apprenticeship program, pre-apprenticeship training, and post-testing feedback. *See* S.A. § IV.F. at 11.

4. Reporting

The Settlement Agreement imposes strict reporting requirements to ensure full and timely compliance with its provisions. First, after the original validity study described above, the Expert will continue to conduct validity studies of the apprenticeship-selection instrument(s) and to document the results of such studies as necessary throughout the term of the Settlement Agreement to meet professional standards. *See* S.A. § V.A. at 11. Second, Ford will implement all recommendations made in follow-up reviews and studies during the period of the analysis within sixty (60) days of publication of the recommendation. *See* S.A. § V.B. at 11. Finally, for each of the three[11] years of the settlement term, the Expert will prepare and submit to the Parties an annual report that will include: (1) the progress made by the Expert in the job analysis and the design and validation of the new selection instrument(s); (2) any recommendations made by the Expert with respect to modification of the selection instruments(s); (3) the names of Settlement Class members who have been placed on Ford's apprenticeship program eligibility list; (4) statistical information regarding the number of African-American and non-African-American candidates who have taken the new test and the number who have passed. *See* S.A. § V.C.1. at 11-12.

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[11] The Settlement Agreement contemplates a three to five year term. *See* S.A. § III.Q. at 5.

C. Monetary Relief

1. Equitable Relief

Ford will select 279[12] members of the Settlement Class and offer them a place on the apprenticeship program eligibility list, using criteria it determines are likely to result in the selection of those individuals most likely to succeed as apprentices.[13] *See* S.A. § VI.A.1.-2. at 12-13. Fifty percent of the 279 will be selected within six months of final approval of the Settlement Agreement, twenty-five percent in the six months after that, and the final twenty-five percent within the next year. *See* S.A. § VI.A.3. at 13. Once placed on the eligibility list, the Class Members will be subject to the same rules as all Ford employees on the list. *See* S.A. § VI.A.4. at 13.

2. Payments to the Settlement Class

Ford will pay $2,400 to each member of the Settlement Class, or his or her heirs, who submits a properly executed claim and release. *See* S.A. § VII.A. at 14. The release will be offered to individuals receiving monetary payments under the terms of the Settlement Agreement. The release language requires a release of claims related to discrimination in the apprenticeship selection process at Ford and existing at the time of Final Approval, including any claims for backpay, front pay, compensatory or punitive damages. This follows the provisions of the Settlement Agreement. *See* S.A. § IX.D.1.-2. at 18-19. The Court should note that this is a narrow release, relating only to apprenticeship and not to any other claim against the Company related to race discrimination.

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[12] Three of the 279 will be Charging Parties. *See* Section III.C.3. *infra*.
[13] Such criteria may include scores on previous tests, seniority, job performance, educational background, and prior work experience. *See* S.A. § VI.A.2. at 12-13.

3. Incentive Awards

Each Charging Party will receive $30,000 in lieu of the $2400 payment to Settlement Class members. This relief is designed to compensate the Charging Parties for diligently initiating and prosecuting the claims at issue in this case and for participating in the EEOC conciliation process. *See* S.A. § VII.B. at 14.

In addition, three of the Charging Parties in this case will be placed on the eligibility list pursuant to the Settlement Agreement.[14] These individuals will be selected using criteria that Ford determines are likely to result in selection of individuals expected to succeed in the apprenticeship program. These individuals will also receive guidance from the Company to assist them in securing apprenticeship positions quickly. *See* S.A. § VI.B.2. at 14.

IV. FINAL APPROVAL OF THE SETTLEMENT IS CLEARLY WARRANTED IN THIS CASE.

The law generally favors and encourages the settlement of class actions. *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981), *vacated on other grounds and modified*, 670 F.2d 71 (6th Cir. 1982); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 371 (S.D. Ohio 1990). In conjunction with the general public policy favoring settlement, "cooperation and voluntary compliance are especially favored in Title VII cases." *Women's Comm. For Equal Empoyment Opportunity v. Nat'l Broad.*

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[14] James Robinson, the first Named Plaintiff, has already been placed on the list. The three Charging Parties chosen will be in addition to Mr. Robinson. *See* S.A. § VI.B.1. at 13.

Co., 76 F.R.D. 173, 182 (S.D.N.Y. 1977). "Voluntary settlement is the preferred method of eliminating employment discrimination." *Vukovich*, 720 F.2d at 923; *see also Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 555 (6th Cir. 1982), *rev'd on other grounds sub nom*, *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). Congress has expressed a "'strong preference' for encouraging voluntary settlement of Title VII actions." *Vukovich*, 720 F.2d at 923. In fact, "[d]ecisions emphasizing the preferred role of settlements under Title VII are legion." *Id.* (providing an exhaustive list of cases supporting the use of settlements in Title VII cases).

In order to garner court approval, a settlement must be "fair, adequate, and reasonable" and "consistent with the public interest." *See Vukovich*, 720 F.2d at 921; *Stotts*, 679 F.2d at 552; *In re Dun & Bradstreet*, 130 F.R.D. at 370; Fed. Judicial Ctr., *Manual for Complex Litigation*, §30.41 (3d ed. 1995) ("*Manual*"). In making this determination, the court must consider "the fairness of the decree to those affected, the adequacy of settlement to the class, and the public interest." *Vukovich*, 720 F.2d at 921. This settlement provides substantial benefits to the class and serves the public interest, particularly given the creative and far-reaching effects of its programmatic and equitable relief.

Before making a determination regarding final approval, a court must first grant preliminary approval, provide notice to interested parties, and hold a fairness hearing. *Vukovich*, 720 F.2d at 921; *Manual* §30.41. This Court substantially evaluated the fairness and adequacy of the settlement during the preliminary approval process. On February 9, 2005, the Court held a thorough hearing on the motion for preliminary approval, at which time the Court made inquiries of counsel for both sides on various aspects of the settlement before granting preliminary approval. Extensive preliminary approval briefs were submitted to the Court, which described the terms of the settlement in detail, fully briefed the issue of class certification, and discussed the factors that weighed in favor of preliminary approval.

The Court preliminarily approved the settlement on February 9, 2005. At that time, the Court set a date for the final fairness hearing, provisionally certified the class, approved the Settlement Class Representatives and Class Counsel, and approved the notice to be sent to all Class Members. A professional service sent notice to Class Members by U.S. mail on or before March 1, 2005. *See* Declaration of Mark Patton, Claims Administrator, May 26, 2005, attached hereto as Exhibit 5, ¶5. Notice was also posted on the Mehri & Skalet website. *See* Mehri Decl. ¶24. The notice process is now complete. Counsel have received five opt-outs and three objections,[15] attached hereto as Exhibit 6 (five opt-outs), Exhibit 7 (two Class Member objections), and Exhibit 8 (one non-class member objection), from a class of 3424 members. None of the three objections seriously challenges the fairness of the proposed settlement, and over 99% of the class supports the settlement.

Courts have developed a list of standard factors to be considered in deciding whether a proposed settlement is fair, reasonable, and adequate: (1) the Plaintiff's likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the

[15] Four objections were originally submitted to Counsel, but one of the four objectors, Darnay Cheeks, has withdrawn his objection. *See* Exhibit 9, Objection of Darnay Cheeks and Letter from Darnay Cheeks withdrawing objection.

judgment of experienced trial counsel; (5) the nature of the negotiations; (6) objections raised by class members; and (7) the public interest. *See In re Dun & Bradstreet*, 130 F.R.D. at 371; *Vukovich*, 720 F.2d at 922-23; *In re S. Ohio Corr. Facility*, 173 F.R.D. at 211. In assessing these factors, the Court should not evaluate the merits of the case, but "should make a sufficient record and enter specific findings to satisfy a reviewing court that it has made the requisite inquiry and has considered the diverse interests and the factors implicated in the determination of fairness, adequacy, and reasonableness." *Manual* §30.41. The application of the above factors to the proposed settlement in this case clearly demonstrates that the Court should grant final approval to the settlement.

A. The Settlement Approaches The Likely Best Result At Trial.

The proposed settlement offers immediate relief to Class Members that likely approaches the class's best possible day in court. *See* Mehri Decl. ¶¶26, 33-35. This is true for several reasons.

First, the settlement offers extraordinary equitable relief to the Settlement Class through the addition of 279[16] class members to the apprenticeship eligibility list, a measure designed to rectify the statistical shortfall of African-American apprentices allegedly caused by the ATSS selection procedure. Even if the class prevailed at trial, Class Members' maximum claims for injunctive relief would be limited to the collective value of any race-based shortfall in apprenticeship positions, divided among the Class Members on a *pro rata* basis. *See United States v. City of Miami*, 195 F.3d 1292, 1300 (11th Cir. 1999) (each class member receives "a proportional share of the full monetary value of the promotion for which they were eligible"); *Pettway v. Am. Cast Iron Pipe*

[16]This number is based on analysis by the EEOC's in-house expert. *See* Mehri Decl. ¶28.

Co., 494 F.2d 211, 263 n. 154 (5th Cir. 1974) (suggesting that the total award should be divided among class members using a *pro rata* formula). Because employees entering the apprenticeship program receive lower income during the training, and because they do not have access to overtime work during the apprenticeship, the value of backpay would be minimal. The 279 places on the apprenticeship eligibility list, which represent the potential race-based shortfall in the apprenticeship selection procedure, fully compensate for any lost front pay.[17] Those Class Members who are not selected for placement on the apprenticeship eligibility list will still benefit from the redesigned selection process through future test administrations. In addition, Class Members will be compensated monetarily, each receiving a $2,400 compensatory damages payment without the burden of having to prove actual individual harm. This make-whole style of relief provides a complete resolution of the narrowly focused claims in this case. Thus, even if the class took this case to trial, it would be unlikely to obtain any greater relief than that provided by the proposed settlement.[18]

Second, if this case went to trial, the class would face a much longer and more contentious legal process, with the various motions, appeals, and delays that are typical byproducts of litigation. The company does not admit liability in the settlement and does not believe that it discriminated against Class Members, and it would vigorously contest any such determination during litigation. More importantly, the Class as a whole would have to assume a substantial risk of obtaining no recovery at all by proceeding with litigation. As a general matter, plaintiffs face an uphill battle in prevailing in employment discrimination cases in federal court. *See* Belton Decl. ¶17. Obtaining class certification in federal courts has also become increasingly difficult in recent years, compounding the risk that would be faced by the class plaintiffs in this case if they pursued litigation. These difficulties exist regardless of the merits of the underlying claims. Thus, pursuing employment discrimination class-action cases in court entails substantial risks that weigh in favor of settlement of such cases rather than litigation.

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[17] An employer may offer a position in lieu of front pay. *See, e.g.*, *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

[18] Emotional distress claims rarely generate significant damages awards without medical or other documentation of dramatic injury. *See Nyman v. FDIC*, 967 F. Supp. 1562, 1570-71 (D.D.C. 1997) (surveying typical compensatory damages awards for discrimination).

Third, because few apprenticeship selection cases have been filed in the last few decades, and because such cases require extensive expert participation and have uncertain financial results, *see* Belton Decl. ¶16, resolving this dispute through settlement reduces both uncertainty and expense. *See* Mehri Decl. ¶¶36-37.

The amount and form of relief offered in the settlement is extensive. Not only has Ford agreed to replace its current selection process with a new, expert-designed selection program intended to reduce adverse impact among African-American test takers, it has also agreed to place an unprecedented 279 class members on the apprenticeship eligibility list to redress the alleged shortfall caused by the current test, and to provide financial compensation to all class members. It is unlikely that such a result would have been achieved if this case had been litigated rather than settled.

B. The Complexity, Expense, and Likely Duration of the Litigation Make Settlement a Preferable Alternative.

Cases such as this one generally involve extensive and complex legal work and cost a substantial amount in attorneys' fees and expenses. Resolving this case through settlement rather than litigation has not eliminated such costs entirely, but it has substantially reduced them. *See* Mehri Decl. ¶37. Because the defendants agreed to engage in settlement negotiations under the EEOC's conciliation process early on, a complaint was not filed until the beginning of the preliminary approval process. It is reasonable to expect that, if litigated, the duration of the litigation would be several years. *See* Mehri Decl. ¶¶33-34. To litigate the case, the plaintiffs would have to go through the class certification process,[19] survive a likely appeal of the class certification decision, and complete discovery on the merits, pretrial proceedings, and a complex class trial on the disparate impact claim.

Indeed, a review of employment discrimination class action cases reveals that such cases often take many years to reach a conclusion. *See, e.g.*, *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) (19 years); *Hartman v. Duffy*, 88 F.3d 1232 (D.C. Cir. 1996) (nearly 20 years); *Salinas v. Roadway Express, Inc.*, 802 F.2d 787 (5th Cir. 1986) (over 15 years); *Johnson v. Univ. Coll. of the Univ. of Ala.*, 706 F.2d 1205 (11th Cir. 1983) (8 years). The proposed settlement will expedite compensation to the class members, provide immediate relief through the addition of 279 class members to the apprenticeship eligibility list, immediately begin the process of designing a nondiscriminatory apprenticeship selection procedure, and generally limit the time and costs expended by all parties.

C. The Judgment of Experienced Trial Counsel Supports Settlement.

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[19] Class certification is often a rigorous and ultimately unsuccessful process for plaintiffs. Many putative classes in employment discrimination cases have been denied certification by district courts in this district. *See, e.g.*, *Brown v. Worthington Steel, Inc.*, 211 F.R.D. 320 (S.D. Ohio 2002) (denying class certification in a race discrimination case); *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466 (S.D. Ohio 2001) (same); *Rosenberg v. Univ. of Cincinnati*, 118 F.R.D. 591 (S.D. Ohio 1987) (denying class certification in a sex discrimination case).

The Court should "defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs" in evaluating the wisdom of granting final approval. *Vukovich*, 720 F.2d at 922-23. *See also Stotts*, 679 F.2d at 554; *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1976). Counsel in this case have extensive experience in complex class-action litigation and are well-qualified to judge both the benefits of the settlement and the risks of proceeding with litigation. *See* Mehri Decl. ¶¶41-43.

Class Counsel has carefully considered the terms of the settlement, the possible relief that could be obtained at trial, and the substantial burdens and risks posed by litigating the case. In light of their substantial experience, Class Counsel have come to the unequivocal conclusion that when the benefits of the settlement are weighed against the long delays and considerable risks of proceeding to trial and the potential outcome if the case was litigated, it is abundantly clear that accepting this settlement is in the best interests of the class. *See* Mehri Decl. ¶38.

D. The Nature of the Negotiations Demonstrates a Fair, Non-Collusive Process.

The settlement negotiations in the instant case were conducted under the auspices of the EEOC's conciliation process. Over the course of almost a year, the parties engaged in intensive, contested, non-collusive arms'-length negotiations. These talks included several meetings in Cincinnati, Detroit, and Washington, D.C., as well as extensive communication with Settlement Class Representatives. At the conclusion of settlement negotiations, the Class Representatives and their Counsel reached an agreement with the Company and the union that achieved the objectives of the Class Representatives. *See* Mehri Decl. ¶21.

E. Objections Raised By Class Members Are Few and Lack Merit.

Only two of the 3424 Class Members have objected to the settlement. It is well-established that one indication of the fairness of a settlement is the lack of, or a small number of, objections. *See, e.g.*, *Laskey v. Int'l Union, United Auto., Aerospace and Agr. Implement Workers of Am.*, 638 F.2d 954 (6th Cir. 1981) (court considered fact that only 7 of 109 class members objected to settlement and found class had been adequately represented); *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990) (one indication of fairness of settlement is small number of or no objections); *In re SmithKline Beckman Corp. Sec. Lit.*, 751 F. Supp. 525 (E.D. Pa. 1990) (absence of objections and small number of opt-outs supported settlement approval).

Moreover, the two objections that were submitted by Class Members (and one submitted by a non-class member) fail to demonstrate that the settlement is unfair or unreasonable. The Sixth Circuit has held that an objector to a settlement "has a heavy burden of demonstrating that the decree is unreasonable." *Vukovich*, 720 F.2d at 921 (citations omitted). *See also Stotts*, 679 F.2d at 551; *In re S. Ohio Corr. Facility*, 173 F.R.D. at 211. As will be explained in more detail in Section VI *infra*, none of the objectors in the instant case comes close to meeting this high standard.

F. The Public Interest Is Advanced By This Settlement.

The proposed settlement benefits the public interest for several reasons. First, the Court's resources will be freed up to allow the resolution of other disputes while allowing the Parties to resolve the claims in the instant case in a cooperative manner. As this Circuit has noted, settlement agreements "reduce the cost of litigation, engender judicial economy, and vindicate an important societal interest in affirmative action." *Stotts*, 679

F.2d at 555. Settlement agreements are desirable because they "minimize the delay, expense, psychological bitterness, and adverse publicity which frequently accompanies adjudicated guilt." *Vukovich*, 720 F.2d at 923; *see also Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980).

Second, the redesign of the apprenticeship-selection process to minimize adverse impact will result in a procedure that is fair to all Ford apprenticeship applicants regardless of race. The perception by Ford employees that the Company affords them equal opportunity to advance will improve morale within the Company and set a positive example for other companies.

Additionally, the attainment of racial diversity is a benefit of the settlement that serves the broader public interest. *Vukovich*, 720 F.2d at 923. The United States Supreme Court recently asserted that true diversity is necessary for America to achieve its promise. *See Grutter v. Bollinger*, 539 U.S. 306, 332 (2003). As Justice O'Connor, writing for the majority, explained, "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* The Court found diversity to be particularly relevant to the business world and noted that several Fortune 500 companies, recognizing that relevance, petitioned the Court in an *amicus curiae* brief to uphold diversity as a compelling interest. *See id.* at 330-31.

In addition to strengthening and improving the Ford community, this settlement serves to fortify the larger community and the nation. By enhancing diversity, it reinforces a compelling national interest and furthers America's fulfillment of its promise as a nation.

V. THE INCENTIVE BONUSES IN THIS SETTLEMENT AGREEMENT ARE FAIR, REASONABLE, AND APPROPRIATE.

In this Circuit, district courts, including this Court, have repeatedly granted incentive awards to named plaintiffs. *See Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (court approves incentive award to named plaintiff where she was "instrumental in bringing [the] lawsuit forward…and performed numerous tasks in association with litigation"); *In re Telectronics Pacing Systems, Inc.*, 137 F. Supp. 2d 1029, 1036-37 (S.D. Ohio 2001) (awarding incentive awards to individual plaintiffs whose "assistance … benefited the Class overall"); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.,* 137 F.R.D. 240, 250-51 (S.D. Ohio 1991) (after considering time, effort and risk, and whether class gain substantial benefit, the court granted incentive awards to six Class Representatives); *In re Dun & Bradstreet*, 130 F.R.D. at 373-74 (after noting that, "[n]umerous courts have not hesitated to grant incentive awards to representative plaintiffs who have been able to effect substantial relief for classes they represent," the court awarded incentive money to Named Plaintiffs who "took action to protect the interests of the Class Members and others").

While the Sixth Circuit has not explicitly approved incentive payments to named plaintiffs, it has issued an opinion indicating that it would approve incentive bonuses in appropriate circumstances. *See Hadix v. Johnson*, 322 F.3d 895, 898 (6th Cir. 2003); *see also Bailey v. Great Lakes Canning, Inc.,* 908 F.2d 38, 41 (6th Cir. 1990) (upholding the reasonableness of a settlement agreement which allowed additional compensation to each named plaintiff, under §1981, for emotional trauma and "as compensation for their legal efforts and assistance rendered to counsel."); *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974) (awarding additional seniority to bus drivers who complained about or appealed discriminatory employment decisions). Moreover, to Counsel's knowledge, no court has ever held that incentive bonuses are never permissible. Rather, the general rule, which the Sixth Circuit articulated in *Hadix*, is that incentive bonuses may be awarded when circumstances warrant them.[20] We believe that such circumstances are present here.

Courts have found it particularly appropriate to award incentive payments to individual plaintiffs for three reasons that apply to the Named Plaintiffs in this case. First, courts have awarded incentive bonuses in cases where named plaintiffs accept personal risk or bring particular types of litigation. In civil rights cases, for example, where the risks to the named plaintiffs are particularly great, and the benefits to the class are particularly important, courts are prone to award incentive bonuses. *See, e.g., In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 710 (E.D. Mich. 1985) (incentive bonus awarded to prison inmates suing to protect prisoners' rights amid fear of "retaliatory practices" by the prison). In employment discrimination litigation, Courts granting incentive awards have noted the risk of retaliation named plaintiffs face for their efforts. *See Roberts v. Texaco*, 979 F. Supp 185, 201 (S.D.N.Y. 1997) ("In discrimination–based litigation, the plaintiff is frequently a present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of

[20] Courts throughout the country regularly approve incentive awards to class representatives in class action cases, as this Circuit has recognized. "[I]ncentive awards are typically awards to class representatives for their often extensive involvement with a lawsuit. Numerous courts have authorized incentive awards." *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003). *See In re U.S. Bancorp Litig.,* 291 F.3d 1035, 1038 (8th Cir. 2002); *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 463 (9th Cir. 2000); *Cook v. Niedert,* 142 F.3d 1004, 1016 (7th Cir. 1998). The Sixth Circuit has not delineated precisely which circumstances make incentive awards appropriate.

litigation at some personal peril."); *Yap v. Sumitomo Corp. of Am.*, 1991 WL 29112 (S.D.N.Y. Feb. 22, 1991) (Title VII plaintiffs risked retaliation and future advancement in bringing the suit); *Women's Comm.*, 76 F.R.D. at 182 (court weighed "risk to job security and good will with coworkers" among other considerations). It is certainly the case here that the Named Plaintiffs accepted substantial risks for bringing an employment discrimination complaint against their employer.

Second, some courts awarding incentive bonuses have focused on the need to encourage litigants to bring class litigation which will further the public policy underlying the statutory scheme. *See Texaco*, 979 F.Supp. at 201 n.25; *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. at 710. In a race discrimination case in this Circuit, the court endorsed this public policy rationale by explaining that "there is something to be said for rewarding those [employees] who protest and help to bring rights to a group of employees who have been the victims of discrimination." *Thornton*, 497 F.2d at 420, and held that it was appropriate to reward those who pursued their claims "more 'than those who were merely passive and indicated no particular desire to transfer or made no effort to bring about . . . an end to this restrictive policy.'" The Named Plaintiffs in this case are clear examples of individuals who have taken affirmative steps to vindicate the rights of an entire class of workers.

Finally, courts often award incentive bonuses in recognition of the active participation of the named plaintiffs. *See, e.g.*, *Enterprise Energy*, 137 F.R.D. at 251 (charging parties took action which "protected the interests of the Class Members and ... resulted in a Settlement that provides substantial ... benefits"); *Yap*, 1991 WL 29112 at *4 (class representatives demonstrated "active participation in the ... case"). The

Charging Parties in this case have expended several years advocating for a just resolution of these issues, and their efforts warrant the incentive payments envisioned by the Settlement Agreement. In addition to assisting Settlement Class Counsel in the investigation, their efforts involved numerous meetings and conference calls, and communicating the views of Class Members to Class Counsel. *See* Mehri Decl. ¶¶39-40.

Given the risks accepted and significant contributions made by the Settlement Class Representatives and Charging Parties to the successful prosecution of this case, and the magnitude of the benefits to the class, incentive payments to the Settlement Class Representatives and Charging Parties are appropriate. The monetary value of the incentive awards and the enhanced possibility of selection[21] is appropriate compared to the total relief provided by the settlement to the class, particularly considering the fact that the monetary incentive bonuses are awarded in place of the $2,400 payment to Class Members, and that those receiving incentive awards are releasing claims in excess of those class members in exchange for the monetary award.

For all of these legitimate and compelling reasons, the Court should grant final approval of the incentive awards to the Settlement Class Representatives and Charging Parties.

VI. THE OBJECTIONS TO THE SETTLEMENT DO NOT PROVIDE A BASIS TO QUESTION ITS FAIRNESS, ADEQUACY, OR REASONABLENESS.

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[21] With respect to the enhanced standing in the apprenticeship class, incentive awards are not limited to monetary relief. *See, e.g., Thornton*, 497 F.2d at 420 (approving award of early seniority to employee class members who actively protested employer's discriminatory employment policy).

The opportunity for class members to be heard is an integral part of the final approval process. For this reason, Settlement Class Representatives and Counsel welcome the close review of the settlement undertaken by class members, and respect the opinions of those who filed objections to the settlement.

Although objections raised should be "carefully considered," *Vukovich*, 720 F.2d at 923, the objections must raise significant and meritorious challenges to the fairness, adequacy or reasonableness of the settlement in order to justify setting aside a settlement that is otherwise in the best interests of the class. *See Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986) ("Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance"); *In re Warner Communications Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986) (a district court judge "should approve or disapprove a proposed agreement as it is placed before him and should not take it upon himself to modify its terms"). Class members had the opportunity to opt out of the settlement or to remain in the class but object to the terms of the Settlement. In this case, only five Class Members opted out, and only two out of 3424 Class Members maintained objections, as did one non-class member. The class has overwhelmingly endorsed the settlement, with over 99% supporting it. Furthermore, the objections filed are meritless or insubstantial, and fail to call into question any aspect of the Settlement Agreement's fairness, adequacy or reasonableness. The objections comprise two categories, which will be addressed in turn: alleged inadequacy of the amount of monetary relief, and the exclusion of employees working at Visteon facilities from the settlement (hereinafter, the "Visteon carveout").

A. Alleged Inadequacy of Monetary Relief

The objection of Ronald Mack, attached hereto in Exhibit 7, is not clearly defined, but appears to reflect an opposition to the amount of compensation that will be paid to Class Members. Mr. Mack alleges that the sum of $2,400 is an "unjust[] reward[]." Objection of Ronald Mack (Ex. 7). This objection reflects a misunderstanding of the nature of the relief awarded by the settlement. If Plaintiffs were to prevail at trial, the make-whole relief to which they would be entitled primarily would be equitable relief in the form of redressing the shortfall caused by the discriminatory selection procedure. The Settlement Agreement provides this make-whole style relief, and, *in addition*, provides for monetary relief for Class Members.

Moreover, as a general matter, the objection of a class member that the amount of monetary relief is inadequate, without more, cannot serve as the basis for an objection substantial enough to merit denying approval of the settlement. *See, e.g.*, *Thomas v. Albright*, 139 F.3d 227, 232 (D.C. Cir. 1998) (noting that "a claim that individual dissenters are entitled to more money is not, by itself, sufficient to reject the overall fairness of [a] settlement"); *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982) (noting that in settlements, "undoubtedly, the amount of the individual shares will be less than what some of the class members feel they deserve but … [t]his is precisely the stuff from which negotiated settlements are made"); *Parker v. Anderson*, 667 F.2d 1204, 1208-1210 (5th Cir. 1982) (upholding settlement where nine of eleven named plaintiffs objected because the settlement amount did not reflect their "personal monetary demands"). The class action settlement, by its very nature, is designed to further the public interest and achieve the greatest good for the greatest number, rather than to enrich individual class members. For this reason, there is an established procedure for class members who believe that their individual claims are worth more than a settlement provides – they can opt-out of the settlement result and bring their claims individually. Mr. Mack has declined to opt-out of the class, choosing instead to collect the sum to which he is entitled under the terms of the Settlement Agreement.

A court "should not reject a settlement merely because individual class members complain that they would have received more had they prevailed after a trial." *Id* .at 231. Here, the objection of Mr. Mack appears to suggest that his individual injuries stemming from his race-discrimination claim with respect to Ford's apprenticeship selection process are "worth more" than the amount he will be entitled to under the settlement. This is an insubstantial basis for denying approval of the settlement. In this case, monetary relief is not, and was not intended to be, the centerpiece of the settlement. Rather, the equitable relief and programmatic relief are two integral parts of the Settlement Agreement that must be taken into account in assessing its overall fairness. In fact, Professor Belton believes that non-monetary forms of relief are more important to the fairness and adequacy of a settlement than cash payments to class members. "As a general proposition, monetary relief, although a critical and an important remedial feature of these settlements, is … backward-looking. … [A] more important feature of these settlements is the long term, forward-looking structural changes or programmatic relief." Belton Decl. ¶¶11-12.

For these reasons, the objection of Ronald Mack does not call into question the fairness, adequacy, or reasonableness of the settlement. The second class-member objection came from Kenneth Jones. Mr. Jones failed to state a reason for his objection to the settlement. *See* Objection of Kenneth Jones, attached hereto in Exhibit 7.

B. The Visteon Carveout

Lawrence L. Wartley, Jr., a non-class member who has no standing to object to the settlement, submitted an objection to the settlement based on the fact that the settlement class specifically excludes those who, like Mr. Wartley, work at a Visteon facility. *See* Objection of Lawrence L. Wartley, Jr., attached hereto as Exhibit 8. The Visteon Corporation was formed in January 2000 as a wholly owned subsidiary of Ford and was spun off as a separate company later that year.

The objection to the Visteon carveout is insubstantial for one main reason: no individual excluded from this settlement by the carveout has waived any of his or her race-discrimination claims.

VII. CONCLUSION

The Settlement Agreement, negotiated by experienced and competent counsel in arms'-length negotiations, is fair, adequate, and reasonable, serves the public interest, and falls well within the requirements for granting final approval. Accordingly, the Parties respectfully request that the Court approve the enclosed Proposed Order and the enclosed Consent Order approving the Settlement Agreement.

Respectfully Submitted,

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